

**THE INDIANA CIVIL RIGHTS COMMISSION**  
**311 West Washington Street**  
**Indianapolis, Indiana 46204**

STATE OF INDIANA    )  
                                  ) SS  
COUNTY OF MARION )

**CHARLES DUDLEY,**  
**Complainant,**

**DOCKET NO. EMra78070584**  
**EEOC NO. 053781325**

**vs.**

**DAVE WAITE PONTIAC,**  
**DATSUN, GMC, INC.,**  
**Respondent.**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER**

Mr. Kenneth W. Maher was appointed to hear this cause pursuant to IC 22-9-1-6(j) (2). He held a hearing at which evidence was presented on April 17, 1980. Complainant Charles Dudley ("Dudley") was present at said hearing and represented by counsel, Mr. Robert D. Lange and Mr. Jay Rodia. Respondent Dave Waite Pontiac, Datsun, GMC, Inc. ("Dave Waite") was represented at said hearing by counsel, Mr. James M. Secrest and Ms. Denise Page of the firm of Hilgedag, Johnson, Secrest & Murphy. Also present was the President of the corporation, Mr. James T. Waite, Jr. At the close of the hearing, the Hearing Officer ordered both parties to submit Proposed Recommended Findings of Fact, Conclusions of Law, and Order by May 2, 1980, and any briefs they desired to file by the same date.

Dudley, by counsel, filed his Proposed Decision on May 2, 1980, as well as a Post-Hearing Brief. The same day, Dave Waite, by counsel, filed its Proposed Findings of Fact and Proposed Conclusion of Law.

On May 16, 1980, the Hearing Officer entered his Recommended Findings of Fact, Conclusions of Law, and Orders (hereinafter referred to as "the Hearing Officer's decision"), which are in words and figures as follows:



**(H.I.)**

Dave Waite, by counsel, timely filed its Objections to Recommended Findings of Fact and Conclusions of Law on May 27, 1980, which Objections are in words and figures as follows:

**(H.I.)**

Dudley by counsel, filed his Reply to Objections to Recommended Findings of Fact and Conclusions of Law, which Reply is in words and figures as follows:

**(H.I.)**

A Hearing on Objections was held on July 24, 1980 before the Indiana Civil Rights Commission ("ICRC"), Chairman James A. Lang presiding. Commissioners present besides Chairman Lang were Dr. Nedra S. Kinerk, Dr. C. T. Bpoyd, Everett J. Coleman and Mary W. Shafer. Absent were Commissioners John C. Carvey and David L. Staples. Dudley was represented by counsel, Messrs. Lange and Ms. Page. Also present was Mr. James T. Waite, Jr. President of Dave Waite.

On July 24, 1980, David Waite, by counsel, filed its Memorandum in Support of Respondent's Objections to Findings of Fact, and Conclusions of Law and its Motion To reopen Hearing, which Motion is in words and figures as follows:

**(H.I.)**

Dudley, by counsel, orally opposed said Motion and it was overruled by Chairman Lang for the reason that no grounds had been presented justifying the reopening of the hear.



Dave Waite, by counsel, then orally moved to have ICRC hear additional evidence which was orally opposed by Dudley's counsel. This motion was overruled for the reason that no justification had been presented for the failure to introduce the evidence before the Hearing Officer.

ICRC then heard arguments of counsel and granted Dave Waite the opportunity to procure and file the transcript of the hearing held before Hearing Officer Maher and allowed Dave Waite fifteen (15) days from the filing thereof to file a Brief. Dudley was granted fifteen (15) days to reply thereto. Dave Waite filed its Brief on August 25, 1980 and Dudley's Reply was filed September 9, 1980.

Having considered all of the above and being duly advised in the premises, ICRC finds and rules as follows:

1. The Hearing Officer's decision does contain certain findings proposed by Dudley. It also fails to contain certain findings proposed by Dudley and contains findings not proposed by Dudley. In these circumstances, particularly, the acceptance of some propositions posited by Dudley is not evidence of bias.
2. The failure of the Hearing Officer's decision to discuss certain evidence and the significance thereof does not establish that he failed to consider it at all. To demand that the Hearing Officer specifically discuss every bit of evidence admitted would create an impossible burden. Nonetheless, we will discuss certain evidence Dave Waite claims the Hearing Officer erroneously failed to consider.
  - a. Respondent urges that the comparison of similarly situated employees failed to consider certain relevant evidence it offered. The evidence Dave Waite calls to our attention related to three (3) reasons it claimed to have caused it to discharge Dudley – chronic tardiness, violation of the management assistance police, and lack of productivity – and hiring and turnover statistics.
  - b. Whether other employees, white or black, were discharged for chronic tardiness has no bearing on whether Dudley was, in fact, chronically tardy. Assuming *arguendo* that the Hearing Officer failed to consider the evidence, said failure makes no difference since he found Dudley was not chronically tardy.



c. Similarly, whether other employees were discharged for violations of the management assistance policy has no bearing on whether Dudley was in violation of said policy or was discharged for such a violation.

d. The Hearing Officer's decision on productivity was based on his finding that Dudley's productivity was acceptable and Dave Waite's failure to follow its own procedure as to discharges for lack of productivity. Again, whether other employees were discharged for lack of productivity is of no moment.

e. The issue in this case was why Dudley was discharged and statistical evidence as to hiring and turnover is of at best minimal probative value.

3. The Hearing Officer was present when the witnesses testified and was able to observe their demeanor while we were not and he is thus better able to judge credibility than are we. Moreover, Dave Waite had advance no argument to ICRC that it could not have argued before the Hearing Officer. Since there is evidence supporting every Finding made by the Hearing Officer, we are in no position to disturb those findings merely because there is conflicting evidence.

4. Dudley's employment history before and after his tenure with Dave Waite is of no relevance to a determination of why he was discharged by Dave Waite. While his subsequent employment history is relevant to damages, the Hearing Officer obviously appropriately considered subsequent employment as it relates to that issue.

5. That Dudley suffered financial damage in lost commissions as a result of the discharge is obvious. What is not clear is the precise amount he would have earned had he not been discharged. While damages may not be awarded where the fact of their existence is speculative, uncertainty as to the precise amount is no bar and doubts are to be resolved against the wrongdoer. Nonetheless, we



believe the Hearing Officer's finding that Dudley would have average ten (10) sales per month after October 22, 1978 to be too high. We believe an average of seven and two-tenths (7.2) sales per month to be more appropriate, based upon Dudley's earnings in his month as a car salesman at Circle Chevrolet of six hundred twelve dollars and twenty-nine cents (\$612.29) divided by the eighty-five dollar (\$85.00) average commission.

6. Dudley's attitude, like anyone else's, is by definition incapable of being observed. Any act or omission evidencing that attitude could have been considered, had there been evidence, as a reason for discharge or, for that matter, as evidence of his attitude.

7. Certain of Respondent's Objections not addressed in its Brief are discussed below, on the assumption that they have not been waived thereby:

a. Any error as to the relevancy of Mr. Prentice's prior employment history is clearly harmless.

b. Dave Waite waived any objection to Finding of Fact 14 that the Hearing Officer could not find that Dudley had harassed female co-workers because the only evidence was hearsay by failing to object to Conclusion of Law 11 that a finding cannot be based exclusively on hearsay. Moreover, Dave Waite had attempted no showing of reliance on the Hearing Officer's statement that hearsay was admissible in failing to call witnesses.

c. The Haring Officer did not ignore Dave Waite's argument that it was the aggregation of deficiencies rather than any single deficiency that cause it to discharge Dudley. He simply found it unsupported by the credible evidence.

d. Any error in the Hearing Officer's reference to a possible cause of action by Dave Waite against the other driver involved in the July 25, 1978 automobile accident is clearly harmless.



3. Finding of Fact 28 is not erroneous.

1. The failure to produce relevant evidence gives rise to an inference that the evidence would have been adverse to the party failing to produce it. It is not absurd to suggest that Dave Waite would have kept the Lori Ford worksheet.

2. The reason Lori Ford left the dealership is highly relevant, a proposition even Dave Waite seems to have accepted by the time it filed its Brief.

**IT IS THEREFORE ORDERED**

1. Paragraphs number thirty six (36), thirty0-seven (37), and forty (40) of the Hearing Officer's Findings of Fact are hereby modified to read as follows:

**Paragraph 36:** The number of cars which Dudley would have sold had he not been discharged may be estimated as follows:

a. Four week period 7/31/78 – 8/26/78 – 6 cars

b. Four week period 8/28/78 – 9/23/78 – 7 cars

c. Four week period 9/25/78 – 10/21/78 – 8 cars

d. Based on the average term of employment for a salesperson being sixteen weeks, Dudley would have been a "seasoned" salesperson as of October 22, 1978.

e. Considering that Prentice's estimates were high for the summer months, and that the evidence indicated sales in winter months are lower, Dudley as a "seasoned" salesman would have averaged approximately seven and two-tenths (7.2) cars per month for 17.9 months from October 22, 1978 through April 17, 1980 for a total of 12894 cars during such period.

f. For the entire period from July 31, 1978 to April 17, 1980, Dudley would have sold 149.94 cars.

**Paragraph 40:** Dudley lost, as a result of being discharged by Waite, a total of seven thousand one hundred seventy-four dollars and forty six cents (\$7,174.46).



2. Paragraph number three (3) of the Hearing Officers Recommended Order is hereby modified to read as follows:

3. Dave Waite shall deliver to ICRC a check, payable to Charles Dudley, in the amount of seven thousand one hundred seventy four dollars and forty six cents (\$7,174.46) minus deductions required by law . and/or agreement.

3. In all other respects, Respondent's Objections To Recommended Findings of Fact and Conclusions of Law should be, and the same hereby are, overruled.

4. With the above exceptions, the Hearing Officer's Recommended Findings of Fact, Conclusions of Law, and Order, which are incorporated by reference herein, should be and the same hereby are, adopted as the Findings of Fact, Conclusions of Law, and Order of this commission

**Dated: October 17, 1980**



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**CHARLES DUDLEY,  
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**DOCKET NO. EMra78070584  
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**vs.**

**DAVE WAITE PONTIAC,  
DATSUN, GMC, INC.,  
Respondent.**

**RECOMMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW, AND ORDER**

The undersigned Hearing Officer was appointed by the Chairman of the Indiana Civil Rights Commission ("ICRC") after ICRC had deemed such an appointment necessary pursuant to IC 22-9-1-6 (j) (2).

A hearing was conducted in the above cause on April 17 1980. Complainant Charles Dudley ("Dudley") was present and represented by counsel, Mr. Robert D. Lange and Mr. Jay Rodia. Respondent Dave Waite Pontiac, Datsun, GMC, Inc. ("Dave Waite"), was represented by counsel Mr. James M. Secrest and Ms. Denise Page of the firm of Hilgedag, Johnson, Secrest, and Murphy of the City of Indianapolis.

Subsequent to the hearing, Dudley, by counsel, filed Proposed Recommended Findings of Fact, Conclusions of Law, and Order and a Post-Hearing Brief, as required and authorized by order of the Hearing Officer at the close of the hearing. Dave Waite, by counsel, also filed Proposed Recommended Findings of Fact, Conclusions of Law, and Order.



Having considered the record, the evidence introduced at the hearing, both oral and documentary, the arguments of counsel, both oral and by brief the proposed decisions and briefs submitted by the parties, and being duly advised in the premises, the Hearing Officer hereby recommends the entry of the following Findings of Fact, Conclusions of Law, and Order:

### **FINDINGS OF FACT**

1. Dudley is a Negro (hereinafter "Black") male citizen of the State of Indiana, thirty seven (37) years of age.
2. Dave Waite is an Indiana corporation, engaged in the retail sale of automobiles. It has, at all relevant times, employed six (6) or more persons for wages or salary. The dealership is located in the City of Indianapolis.
3. Dudley was employed by Dave Waite beginning on July 3, 1978 as a New Car Salesperson.
4. As would be expected, a salesperson's job at Dave Waite is to sell automobiles. Though New Car salespersons' primary function was to sell new automobiles, they were authorized to sell used automobiles.
5. Salespersons were paid on a commission basis, receiving twenty five percent (25%) of the gross profit on each car sold. In weeks where salespersons' sales were not high enough that the amount received was as high as minimum wage, Dave Waite paid them the difference between the minimum wage and their commissions as well. It is unclear whether this was treated as a draw against future commissions.
6. Salespersons were assigned certain shifts to which they were required to work. In addition to working during the assigned shift, each salesperson was required to attend all sales meetings (held three times a week during Dudley's tenure with Dave Waite at 8:30 am every Monday, Wednesday, and Friday), and was permitted to work any other hours during which the dealership was open for business.



7. When Dudley was hired by Dave Waite, he had had at most twenty (20) months of sales experience, none of that selling cars. Dave Waite was aware of this.

8. Dudley's supervisor when he was employed at Dave Waite was Mr. Emerson Eugene Prentice, Sr. ("Prentice"), the General Sales Manager. Prentice, a Caucasian (hereinafter "White"), held this position between May of 1978 and September of 1978. Some four (4) months prior to that, he had been fired from a similar position at Northside AMC Jeep because he had sold a vehicle wholesale to a customer who failed to pay for the vehicle. In the interim, he had been "in the wholesale end" of the automobile business.

9. Dudley was discharged by Dave Waite on July 31, 1978.

10. Dudley filed the instant complaint with ICRC on July 31, 1978, contending that he was discharged because of his race.

11. Dudley's complaint was properly served on Dave Waite, which timely filed its Answer on August 29, 1978, contending that Dudley was terminated for allowing a customer to leave the dealership without the benefit of management assistance in violation of Sales Management Policy. This was provided in response to a direct questions as to why Dudley was terminated. In the same letter, Dave Waite stated "[I]n further explanation" that Dudley failed to seek the required information at the scene of an accident in which he was involved while driving a company demonstrator automobile. This Answer also refers to what it contends was Dudley's repeated tardiness to work and sales meetings though it does not specifically assert that tardiness was a factor in the decision to discharge Dudley.

12. At the hearing Prentice stated that the reasons for Dudley's termination were:

- a. Habitual and excessive tardiness.
- b. Harassment of female co-workers.
- c. Failure to follow established company policy in sales procedure and techniques.



- d. Lack of productivity.
- e. Attitude problems toward job and co-workers.
- f. Failure to follow proper procedure after involvement of company demonstrator in automobile accident and failure to pay deductible for damage to company auto.

13. Dudley's alleged chronic tardiness is in sharp dispute. Dudley testified he was late on (1) or two (2) times. Prentice testified that he was late three (3) to five (5) times per week. Boggs testified that Dudley was frequently late. I credit Dudley and find he was not terminated for tardiness for the following reasons:

- a. Prentice testified that it was standard practice to send salespersons who were late to sales meetings home with no pay for the day. Since sales meetings were held thrice weekly, if Dudley were late three (3) to five (5) times per week, he would have to have been sent home more than once. Yet, it is clear he was only sent home once.
- b. The President of Dave Waite, Mr. James T. Waite, testified that Prentice was hired because of his reputation as a disciplinarian. Under such circumstances, it strains credibility too far to believe that Prentice would allow such chronic tardiness to continue for four (4) weeks without even a written warning.
- c. According to company policy as set forth in the Dave Waite Employee Handbook ("Respondent's Exhibit 6 pages 1-A, 2-A, and 3-A) excessive tardiness was not grounds for immediate dismissal, but was subject to a three-step disciplinary action including a written warning to be placed in the employee's personnel folder for the first offense and a disciplinary lay off without pay for the second offense. Dave Waite failed to produce any evidence of a written warning, of a disciplinary layoff (unless the one day that he was sent home of being late to sales meeting could be so construed), or of any specific date of time of tardiness subsequent to the day he was sent home from a sales meeting.
- d. Dave Waite utilized time cards or time sheets to record time worked, which were not produced.

14. The Hearing Officer is unable to find that Dudley harassed any female co-workers since the only testimony regarding such conduct was based on hearsay and not personal knowledge.



15. The Hearing Officer further finds that Dudley was not terminated for lack of productivity, such finding being based on the following evidence.

a. Although Dudley had never sold cars before and was employed only four weeks, he had sold between four (4) and six (6) vehicles during such period.

b. Linda Pollock and Keith Tate were salespeople hired at the same time as Dudley and they sold five (5) cars and one (1) car respectively, and neither Pollock nor Tate were terminated for lack of productivity. The evidence was that Linda Pollock worked two or two and a half months and resigned, and that Keith Tate was terminated after four weeks for failure to have a driver's license.

c. Although the company policy provided for a three step disciplinary action for "careless or inefficient performance of job duties resulting in either poor quality of quantity of work", the evidence fails to show that either of the first two steps were ever imposed.

16. Only Dudley was competent to testify concerning his attitude toward his job and co-workers, and his testimony indicated that his attitude was positive. To the extent that other testifying had drawn conclusions regarding Dudley's attitude, such conclusions are not probative evidence as to Dudley's attitude. Any alleged conduct of Dudley considered by others in drawing their conclusions was or could have been alleged as a reason for termination.

17. On July 25, 1978, Dudley was involved in an accident while driving a company owned demonstrator. Any failure of Dudley's to obtain required information at the scene of such accident was remedied a couple days later when Dudley obtained and provided to Dave Waite a copy of the accident reported prepared by the Indianapolis Police Department.

18. Although it is not possible from the evidence presented at hearing to determine liability for the accident, considering the police report (Complainant's Exhibit D) and the testimony of Dudley, it is probable that Dave Waite had a cause of action against the other driver.

19. Dudley had signed an "employee Participation Agreement Dave Waite Demonstrator Program" form (Respondents Exhibit 1) which provided in part:



I also agree that I am responsible for the first \$500 worth of damage done to the car by reason of accident, carelessness, or misuse during the entire period it is assigned to me. In the case of an accident where this company can collect the \$500 deductible, it will be reimbursed to me.

20. Dudley testified that he had been told by Prentice that his responsibility for the \$500 deductible applied only if the accident was his fault. Prentice denied making any such statement. Considering the language of the agreement, particularly the word “reimburse”, I credit Prentice concerning this matter.

21. Nevertheless, I must find that Dave Waite did not terminate Dudley for failure to pay the \$500 deductible for the following reasons:

a. No evidence was presented that Dave Waite had made any demand for payment or informed Dudley that he might be terminated for failure to pay the deductible.

b. Dudley was not told at the time of his termination that the failure to pay was the reason or one of the reasons for his termination.

c. At the time of Dudley's termination only six days had elapsed since the accident.

d. It is just too unlikely to believe that an employee would be terminated for failure to pay a \$500 deductible within six days without demand or warning, and without being told on termination that the failure to pay was a reason.

e. The span of six days without demand or warning makes it reasonable to infer that, although Dave Waite was not required to do so, it was in fact waiting to ascertain whether it could collect the \$500 deductible promptly from the other driver (and would thus be obligated to reimburse Dudley anyway before requiring payment by Dudley).

22. On Dudley's last day at Dave Waite, his last acts on behalf of Dave Waite involved with a customer named Lori Ford. That Dudley conferred with Ms. Ford, that she left without buying a car and that a Mr. Richard James Boggs (“Boggs”) a white salesperson, spoke with her after she left the showroom are agreed. The remainder of the events constituting this incident are in dispute.

23. Dudley testified, in sum, as follows: he arrived at work that day at approximately 8:00 am and had walked in with another salesperson, never named. He had been at his desk for about fifteen (15) minutes when Prentice



directed him to work a customer who had been sitting at the other salesperson's desk. He spoke to her and she indicated that she had come to see the other salesperson. Dudley paged him, both inside and outside the showroom, to no avail. Ms. Ford told Dudley that she was running late for work and indicated that she would return that evening. Shortly thereafter, he saw Boggs go out and speak to Ms. Ford. After Boggs returned he (Boggs) spoke to Prentice, who approached Dudley and told him he was terminated for failure to comply company policy requiring the seeking of management assistance when difficulties arise in the closing of a deal. He was fired no later than 8:45 am.

24. Dave Waite's rendition of what occurred was set out by Prentice and Boggs, and was, in sum, as follows: Prentice had left the Manager's desk for a period and had left Boggs in charge. Boggs saw Dudley and Ms. Ford working on some paperwork and conversing. When Ms. Ford left, Boggs knew that she had not purchased a car because his approval of the price, which would have been required, had not been sought. Therefore, he went and spoke with Ms. Ford and was told the price she had been quoted. According to Boggs, the figure involved a gross profit of six hundred to seven hundred (\$600.00 to \$700.00). When Prentice returned, Boggs informed him of these events. Prentice spoke to Dudley, saw a work sheet verifying Boggs' report on the price, and terminated him for failure to comply with the aforementioned policy. Prentice stated that Dudley had been warned before on that very day when he (Dudley) had failed to comply with the policy with the aforementioned policy. Prentice stated that Dudley had been warned before on that very day when he (Dudley) had failed to comply with the policy that future violations would not be tolerated. Prentice stated that Dudley's discharge occurred between 10:00 am and 11:00 am.

25. The policy in question was that all sales personnel are required to invite experienced management assistance in any instance in which customers express dissatisfaction with any phase of the sales consummation. This policy, in fact, applied only when customers had expressed an interest in a particular vehicle and their trade-in, if any, had been appraised. Dudley was aware of the policy.



26. This “management assistance policy” was intertwined with the concept, apparently used throughout the retail automobile sales industry of “letting the customer out on a figure”. Letting the customer out on a figure means communicating a price as low as feasible, given the dealer’s cost. The dealership naturally wants to leave the customer with a price that its competitors will have difficulty in beating profitably.

27. Dudley’s version of the Ford incident is, in essence, a claim that all he did was try to avoid “skating”, a practice which is discouraged by Dave Waite and will likely lead to unfavorable relations with other sales personnel. Skating is the practice of working a customer who had come to see another salesperson with which the customer, euphemistically called a “be-back”, had previously discussed purchasing a car.

28. I find Dudley’s version more credible for the following reasons:

a. Prentice testimony was internally inconsistent. For example, he testified that Dudley had been warned twice before regarding the management assistance policy on the same day. Yet he only testified about one prior warning that based on a report to him by Boggs.

b. Boggs testified about an incident earlier in the day but had not way of knowing that the person he (Boggs) allegedly saw talking with Dudley was even a customer.

c. The work sheet, if it existed at all, was in the control of Dave Waite but was not produced. Such a work sheet would have directly contradicted Dudley’s testimony and corroborated Prentice.

d. Dave Waite’s answer in this cause made the following statement concerning Dudley’s dealing with Lori Ford:

Ms. Lori Ford, the customer Mr. Dudley was assisting at the time of his termination, left the dealership without having talked with anyone at the Sales Management Desk, therefore, we cannot respond as to any detail or specifically, the request for appraisal.

This statement appears in conflict with detail testified to at hearing concerning Lori Ford having been “let out” on a gross profit figure of six hundred to seven hundred dollars (\$600.00 to \$700.00).



e. The fact that Lori ford left after Boggs spoke with her leads to a reasonable inference that her reason for leaving was, as Dudley testified, that she was running late for work and/or she just wished to speak with her original salesperson. If her reason for leaving had been dissatisfaction with the price, Boggs could have quoted her, or offered to attempt to obtain for her, a lower gross profit deal.

29. Dave Waite also introduced evidence to the effect that Dudley stole the demonstrator assigned to him at the time of discharge. Dudley denied this. Since this occurred, if it did, after the discharge, it is obviously not relevant to why Dudley was discharged. To the degree that it could reflect on Dudley's credibility, I cannot discredit Dudley's testimony for the following reasons:

a. The only evidence that tends to show that Dudley possessed the vehicle after his discharge is Prentice testimony that Dudley did not turn over the keys, stating that he needed to get some personal materials out of the vehicle.

b. Prentice testimony that a woman, whose name he apparently failed to write down and has not forgotten made two (2) phone calls accurately describing a car wit the same license number as the demonstrator assigned to Dudley, even if true, has no tendency to show Dudley had anything to do with getting it there.

c. Prentice testimony that the car was ultimately "re-stolen" by a Mr. Ron Taylor from an unidentified "black area" is of equal insignificance in showing that Dudley had anything to do with its being there, if it was.

d. Although Prentice also testified that Mr. Taylor "knew" that Dudley had the car, Mr. Taylor was neither present at the hearing nor deposed and Prentice testimony cannot be considered probative as what Mr. Taylor "knew" or how he knew it.

e. Dudley's testimony that he returned to Dave Waite a week after his discharge and picked up his last paycheck with no "disturbance" was un rebutted. Even if Prentice was not around at the time, as he claims, it is hard believe that no one had heard that Dudley was thought to possess property of Dave Waite.



30. Dudley admitted on cross-examination that he had been convicted of a felony, to-wit, robbery. In resolving the credibility questions, I have considered this fact and nonetheless find Dudley's testimony credible for the following reasons:

a. The robbery for which Dudley was convicted occurred on December 22, 1965 [See *Dudley v. State* 255 Ind. 176, 263 N.E. 2d 161 (1970)] at a time when Dudley was twenty-three (23) years old.

b. Dudley appeared quite candid while testifying, admitting to various facts concerning his employment history, which were at a minimum, embarrassing, with no effort at evasiveness.

31. Dudley's job performance was at least adequate when compared with other similarly situated employees considering:

a. Finding Number 15, *supra*, on productivity

b. Finding Number 13, *supra*, concerning attendance, and the fact that other employees had also been sent home for being late to a sales meeting.

c. The absence of any written warnings to Dudley concerning his job performance.

32. Dudley was not discharged for any of the reasons set forth in Finding Number 12, *supra*, either individually or in combination; nor does the evidence establish that Dudley could not have been a successful salesperson. Since no other reason was advanced by Dave Waite and since there was surely some reason for its decision to discharge Dudley, I find that the reason was his race.

33. Dave Waite has continued to employ persons in the position of salesperson subsequent to Dudley's discharge.

34. Had Dudley not been discharged by Dave Waite, he would have been at least marginally successful in selling cars based upon the following considerations:



a. Prentice testified that eight (8) to twelve (12) cars per month would have been a good amount for a new salesperson at that time and thirteen (13) to seventeen (17) cars per month would be a good amount for a seasoned salesperson.

b. The evidence shows that at least two (2) new salespersons sold fewer than three cars per month (Pollock and Tate).

c. During the five month period from May 1, 1978 to September 30, 1978, Complainant's Exhibit A shows that only one salesperson sold more than sixty-five (65) units which would be required to average thirteen (13) units per month for five months.

d. Prentice's estimates are, therefore, high.

36. The number of cars which Dudley would have sold had he not been discharged may be estimated as follows:

a. Four week period 7/31/78 – 8/26/78 – 6 cars

b. Four week period 8/28/78 – 9/23/78 – 7 cars

c. Four week period 9/25/78 – 10/21/78 – 8 cars

d. Based on average term of employment for a salesperson being sixteen weeks, Dudley would have been a "seasoned" salesperson as of October 22, 1978.

e. Considering that Prentice's estimates were high for the summer months, and that the evidence indicated sales in winter months are lower, Dudley as a "seasoned" salesman would have averaged approximately ten (10) cars per month for 17.9 months from October 22, 1978 through April 17, 1980 for a total of 179 cars during such period.

f. For the entire period from July 31, 1978 to April 17, 1980, Dudley would have sold 200 cars.

37. Had Dudley not been discharged from Dave Waite, he would have earned from July 31, 1978 to April 18, 1980, a total of seventeen thousand dollars (\$17,000.00), calculated on the following basis:

$$200 \text{ cars} \times \$85.00 \text{ Commission} = \$17,000.00$$



38. Dudley actually earned as of April 17, 1980, since his discharge from Dave Waite, a total of five thousand five hundred seventy dollars and fifty three cents (\$5,570.53) as follows:

<u>AMOUNT</u>	<u>EMPLOYER</u>
\$ 612.29	Circle Chevrolet, Inc.
3800.00	Fawn Vending and Sales Co. of Indiana
<u>1158.24</u>	Buchanon Realty
<b>\$5570.53 – Total</b>	

39. There is no evidence that, during the period subsequent to his discharge at Dave Waite, Dudley either failed to apply for a job he could have gotten or that he turned down a job that was offered to him.

40. Dudley lost as a result of being discharged by Waite, a total of eleven thousand four hundred twenty nine dollars and forty seven cents (\$11,429.47).

41. Any Conclusion of Law which should have been deemed a Finding of Fact is hereby adopted as such.

### **CONCLUSIONS OF LAW**

1. ICRC has jurisdiction over the subject matter of Dudley's complaint and over the parties.

2. The complaint was timely filed.

3. Dave Waite is a "person" as that term is defined in IX 22-9-1-3(h).

4. Dave Waite is an "employer" as that term is defined in IC 22-9-1-3(h).

5. ICRC does not have jurisdiction to determine whether Dudley owes Dave Waite any sum of money as a result of the accident in the demonstrator.

6. Dudley made a prima facie case [See *McDonnell Douglas Corp. v. Green* 411 U.S., 742 (1973)] that his discharge was because of his race and, therefore, a discriminatory practice as defined by IC 22-9-1-3(1) when he proved the following:



- a. He is black;
- b. He adequately performed his job in relation to similarly situated employees.
- c. Dave Waite had continued to employ persons in the position of salesperson; and
- d. He was discharged.

7. Dave Waite failed to rebut Dudley's prima facie case when it failed to prove that any of its stated reasons were the reasons for Dudley's discharge.

8. Dave Waite excluded Dudley from equal opportunity in employment because of race when it discharged him from employment because of his race. Because there is no specific exemption for such a practice in the Indiana Civil Rights Laws, IC 22-9-1, the practice was an unlawful discriminatory practice. IC 22-9-1-3(1).

9. IC 22-9-1-6(k) (1) provides, in material part, that

...if the Commission finds a person has engaged in an unlawful discriminatory practice, it may cause to be served on such person an order requiring such person to cease and desist from the unlawful discriminatory practice and requiring such further affirmative action as will effectuate the purposes of this chapter, including but not limited to the power to restore complainant's losses incurred as a result of discriminatory treatment, as the Commission may deem necessary to assure justice, provided, however that this specific provision when applied to orders pertaining to employment shall include only wages, salary or commissions... . IC 22-9-1-6(k) (1).

10. The burden of proof on the issue of mitigation of damages is on the party claiming the lack of mitigation. Since there was no evidence introduced by Dave Waite of any available jobs which Dudley failed to seek or any jobs offered which Dudley did not accept, it has failed to meet its burden of demonstrating that Dudley has not taken reasonable steps to mitigate his damages.



11. An administrative hearing finding cannot be based exclusively on hearsay evidence. *Cornell v. Review Board of Indiana Employment Security Division* (1979), \_\_\_\_ Ind. App. \_\_\_\_, 383 N.E. 2d 1102.
12. Where strong evidence is available to a party who presents weak evidence instead, it is proper to presume, absent an explanation, that the strong evidence would have hurt that party's case.
13. Any Finding of Fact which should have been deemed a Conclusion of Law is hereby adopted as such.

### **ORDER**

1. Dave Waite shall cease and desist from discharging employees because of race.
2. Dave Waite shall offer Dudley, in writing, employment as anew car salesperson under the conditions set out below. A copy of the offer shall be promptly delivered to ICRC.
  - a. Dudley shall have at least two (2) weeks from receipt of the offer to report for employment.
  - b. Said employment shall be at the rate of pay and with all benefits that he would have had had he been continuously employed from and including July 3, 1978.
  - c. In all employment decision, including but not limited to lay-off and promotion, Dudley shall be treated to the degree it is relevant, as if he had been continuously employed from and including July 3, 1978.
  - d. No adverse decision with respect to Dudley's employment, should he accept the offer, shall be based, in any part on alleged or perceived misconduct or deficiencies which were or could have been brought up with respect to this litigation.
3. Dave Waite shall deliver to ICRC a check, payable to Charles Dudley, in the amount of eleven thousand four hundred twenty nine dollars and forty seven cents (\$11,429.47) minus deductions required by law and/or agreement.



4. Unless stayed by a court of competent jurisdiction, the obligations imposed by this Order shall be completely executed no later than thirty (3) days from the date that a majority of the members of ICRC approve this Order and Respondent receives a copy thereof.

**Dated: May 16, 1980**